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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

RONALD D. CASTILLE, District Attorney
of Philadelphia County;
DONALD T. VAUGHN, Superintendent,
State Correctional Institute at
Graterford, and ERNEST D. PREATE, Jr.,
Attorney General of Pennsylvania,
Petitioners

V.

JAMES CLARK,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. May federal habeas relief be granted notwithstanding a federal habeas court's own finding that the state prisoner's delay in raising his claim has "compellingly" prejudiced the state's ability to respond?

2. Do Maleng v. Cook and Burgett v. Texas permit indirect attacks on otherwise final state court judgments where such attacks rely on grounds other than the inherent unreliability of the convictions?

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Petitioners, Ronald D. Castille, District Attorney of Philadelphia County, Donald T. Vaughn, Superintendent, State Correctional Institute at Graterford, and Ernest D. Preate, Jr., Attorney General of the Commonwealth of Pennsylvania, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Third Circuit, entered in this proceeding on December 27, 1989.

OPINIONS BELOW

The published panel opinion of the United States Court of Appeals for the Third Circuit, reversing the United States District Court for the Eastern District of Pennsylvania and granting the petition for habeas corpus, is reprinted in Appendix A. The order denying rehearing is reprinted in Appendix B. The orders and memorandum of the United States District Court for the Eastern District of Pennsylvania denying the instant habeas petition appear in Appendix C.

STATEMENT OF JURISDICTION

Respondent James Clark brought this habeas corpus action pursuant to 28 U.S.C. §2254. The judgment of the United States Court of Appeals for the Third Circuit, granting habeas corpus relief, was entered on December 27, 1989.

Petitioner's request for rehearing was denied on January 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Habeas Corpus Statute, 28 U.S.C. §2254(a)
§2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 9(a), Rules Governing Section 2254 Cases In The United States District Courts

Rule 9. Delayed or Successive Petitions

(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

STATEMENT OF THE CASE

In 1974, respondent James Clark, although technically still a juvenile, was tried for two unrelated sexual assaults in the Philadelphia Court Trial Division, known informally as "adult court."[1] Choosing not to divulge his juvenile status to the courts, on May 24, 1974

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[1] A "child" for purposes of the Pennsylvania Juvenile Act is an individual under the age of eighteen years at the time a crime is committed. See 42 Pa. Cons. Stat. Ann. §6302 (Purdon 1972). Respondent was seventeen at the time the two crimes were committed, although he was eighteen at the time of the trials. The reason why his cases originated in adult court is not of record. It appears that respondent told police his age at the time he was arrested; the juvenile court records, which were available to police for confirmation, however, then listed him as nineteen years of age. See Exhibit C, at A-87-A-88. It is undisputed that respondent did not challenge the juvenile court records; neither did he produce a birth certificate or other evidence of his age until over a decade later when he sought to reduce a sentence in a subsequent case.

respondent entered a no contest plea to conspiracy and attempted rape for the first assault. Subsequently, on July 19, 1974, he was found guilty of felonious restraint after a bench trial for the second sexual assault. Respondent received lenient sentences and took no direct appeal of the convictions. He completed serving both sentences in 1978.[2]

In 1979, little more than a year after his release from state supervision,

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[2]As a first time offender in adult criminal court, respondent received a sentence of three to twenty-three months' incarceration and three years' probation for the first offense, and a concurrent sentence of eleven to twenty-three months on work release for the second offense. By way of contrast, as a juvenile with prior delinquency findings, who was also an escapee from a juvenile detention facility with a then outstanding bench warrant against him, had respondent been committed as a juvenile the juvenile authorities could have held him in a juvenile detention facility until he was twenty-one years of age.

respondent was convicted by a Philadelphia jury of rape and related charges for an attack on a Philadelphia salesgirl. After reviewing respondent's pre-sentence report, which included the two 1974 convictions, the state court, on September 17, 1980, sentenced respondent to ten to twenty years incarceration for rape and to a consecutive term of imprisonment of two to five years for felonious restraint. Respondent is currently in state custody on that sentence.

Respondent thereafter collaterally attacked the 1974 convictions in an attempt to reduce his 1980 sentences. He contended that the adult court lacked jurisdiction over him in 1974 because he was a juvenile, and that his counsel, at both the 1980 sentencing and the 1974 proceedings, had been ineffective for not

raising that claim.[3] In denying both claims, the state court found that respondent's true age had not come to the attention of either judge in adult court and, thus, that state law did not require that respondent be returned to juvenile court for a certification hearing.[4]

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[3]The Pennsylvania Constitution, Const. Sched. Art. 5, §16 (Purdon 1978), divides the Philadelphia Court of Common Pleas into three divisions with concurrent jurisdiction: Trial Division, Orphans Court Division, and Family Court Division. This provision was subsequently codified on June 27, 1978 in 42 Pa. Cons. Stat. Ann. §952. The codification reiterates that the divisions of the Court of Common Pleas are administrative units and that each division is vested with full jurisdiction of the whole Court.

[4]Where proceedings against juveniles are initiated by delinquency petitions in juvenile court, the case may be transferred to adult court after a certification hearing in which the prosecution produces evidence to demonstrate that the juvenile is not amenable to treatment at a juvenile facility. See 42 Pa. Cons. Stat. Ann. §6355 (Purdon 1972). Where, as instantly, (Footnote Continued)

In October, 1985, respondent filed federal habeas corpus petitions challenging the 1974 convictions on the jurisdictional and ineffectiveness grounds raised in state court. The magistrate recommended that relief be granted based on a Kent v. United States, 383 U.S. 541 (1961), due process violation which had not been asserted by respondent. The District Court rejected that recommendation and denied relief. Respondent then appealed.

(Footnote Continued)
proceedings against juveniles originate in adult court, state law requires a remand of the proceedings to juvenile court only where it "appears" to the adult court that the "defendant is a child." 42 Pa. Cons. Stat. Ann. §6322 (Purdon 1972). Even where the adult court's judgment as to a defendant's age proves by hindsight to have been erroneous, where the juvenile offers neither correction nor objection, the failure to transfer a case to juvenile court is not error under Pennsylvania law. See Commonwealth v. Sims, 379 Pa. Super. 252, 549 A.2d 1280 (1988).

The United States Court of Appeals for the Third Circuit reversed the District Court and ordered resentencing in the 1980 conviction based on the purported Kent due process violation. Recognizing that the due process claim had not been raised in state court, the Third Circuit found that the claim was defaulted in state court and concluded, erroneously, that the claim was thereby reviewable in federal court.[5] Specifically, the court found that 42 Pa. Cons. Stat. Ann. §9543(b) would bar state review of the

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[5]Inexplicably, the court reached this conclusion without ever addressing the cause and prejudice standard required for procedurally defaulted claims, improperly allowing habeas relief even though respondent never alleged or proved cause for his default. See Teague v. Lane, 109 S.Ct. 1060, 1067-1069 (1989); Wainwright v. Sykes, 433 U.S. 72 (1977). The Third Circuit's result is thus in direct conflict with this Court's decision in Teague.

claim because: (a) the sixteen-year delay in raising the claim was "self-evident;" (b) at all times respondent knew of the crucial facts underlying the claim, and (c) the prejudice to the Commonwealth was "compelling." "[G]iven the death of the trial judge involved and the destruction of the relevant stenographic notes, to now defend against this issue in a collateral proceeding would be virtually impossible." Appendix A, at A-14.[6]

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[6] 42 Pa. Cons. Stat. Ann. §9543(b) states:

> (b) Exception. - Even if the petitioner meets the requirements of subsection (a), the petition shall be dismissed if it appears that, because of delay in filing the petition, the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner. This subsection does not apply if the petitioner shows that the petition is based on grounds of which the

(Footnote Continued)

Inexplicably, given its findings, the Third Circuit granted habeas relief. In so doing, it did not address the applicability of Rule 9(a), Rules Governing Section 2254 Proceedings in the United States District Courts. Neither did it explain what factors could exempt the case from Rule 9(a), but compel application of 42 Pa. Cons. Sta. Ann. §9543(b), when both sections are based on the same factors of prejudicial delay.

In reaching the merits of respondent's due process claim, the Third Circuit, without the benefit of the state court record, also inexplicably and incredibly disregarded the findings of the state court. Based on concededly

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(Footnote Continued)
petitioner could not have had knowledge by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth.

incomplete and conflicting evidence, the Third Circuit found that the trial courts in respondent's 1974 cases should have learned of respondent's true age, although respondent did not disclose it to the courts, and that their failure to do so violated respondent's due process right to a certification hearing under Kent.[7] The

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[7]The Third Circuit's interpretation of state law is incorrect and is unsupported by any state case. Its approach places trial courts in the untenable position of risking error if they do not search for evidence of juvenile status even if no basis exists for doing so. Further such searches, requiring access to record documents containing inadmissible facts or prior convictions, could cause unnecessary and impermissible prejudice.

The federal court should not have intruded into state statutory interpretaion, especially where it also found that the state prisoner's own dilatoriness would preclude the state itself from considering such a new interpretation. The Court's error was particularly egregious given that an evidentiary record cannot now be made to

(Footnote Continued)

court then granted relief based on United States v. Tucker, 404 U.S. 443 (1973), which permitted sentencing relief based on a violation of Gideon v. Wainwright, 372 U.S. 335 (1965). In so doing it concluded that the Kent due process violation which it found had here occurred rose to the level of the Gideon deprivation at issue in Tucker. Appendix A, A-44 - A-45.

(Footnote Continued)
determine whether the state courts had engaged in such a search or even whether there had been a discussion regarding petitioner's age by the courts.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW TO RESTORE FINALITY TO STATE JUDGMENTS, WHICH THE THIRD CIRCUIT'S OPINION HERE HAS FUNDAMENTALLY THREATENED, AND TO RESOLVE THE DIRECT DECISIONAL CONFLICT AMONG THE CIRCUITS ON THE EXTENT TO WHICH PRIOR OTHERWISE FINAL CONVICTIONS MAY BE SUBJECT TO REOPENED ATTACK.

Vital to the effectiveness of a state's judicial system is confidence in the finality of its judgments. As this Court has recognized, "[a]t some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation." Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring opinion). That state interest is directly and compellingly threatened by the Third Circuit decision here at issue.

Last term in Maleng v. Cook, 109 S.Ct. 1923 (1989), this Court reviewed issues strikingly similar to those raised here. The Maleng court approved, in principle, review under Burgett v. Texas, 389 U.S. 109 (1967), and its progeny for habeas challenges to prior convictions which enhance a current sentence. Citing Rule 9(a), however, it expressly left open the question of the extent to which prior convictions were subject to such attacks. See Maleng v. Cook, 109 S.Ct. at 1927.

The Third Circuit opinion in this case directly raises the issue left open in Maleng in two ways. First, it granted windfall relief to this state prisoner notwithstanding its own finding of delay "compellingly" prejudicial to the state, contrary to the dictates of Rule 9(a). Further, it applied the Burgett remedy to reopen an otherwise final state judgment whose sentence had been fully

served based on a claim of constitutional error which, being unconcerned with the reliability of the factfindings, was not within the scope of Burgett's extraordinary form of review. Neither extension of the habeas remedy allowed in Maleng should be permitted to stand.

1. **Prejudicial Delay**

Unquestionably, the findings by the Third Circuit triggered the application of Rule 9(a). The court found that: (a) the due process claim had not been raised in state court, (b) "at all times" respondent knew of the crucial facts underlying the claim, (c) the sixteen year delay in pursuing the claim was "self-evident," and (d) the prejudice to the Commonwealth was "compelling" in light of the death of the trial judge and the destruction of the relevant stenographic notes, making defense against the due process claim in a collateral proceeding

"virtually impossible." No clearer finding of prejudicial delay could be imagined.

The Third Circuit's refusal to apply Rule 9(a) in these circumstances puts it in conflict with every other circuit addressing the use of Rule 9(a) upon a finding of prejudicial delay. See McGee v. Estelle, 732 F.2d 447 (5th Cir. 1984) (remand for dismissal if district court finds that delay by state prisoner prejudiced state's ability to respond to Burgett Gideon claim); Arnold v. Marshall, 567 F.2d 83 (6th Cir.), cert. denied, 455 U.S. 922 (1982) (Rule 9(a) dismissal required where state was prejudiced in its ability to respond by twenty-seven year delay in attacking a 1953 burglary conviction used to enhance a 1973 recidivist conviction); Henson v. Estelle, 641 F.2d 250, 253 (5th Cir.), reh. denied 645 F.2d 71 cert. denied, 454 U.S. 1056 (1981)

(Rule 9(a) dismissal required where eighteen-year delay in attack on guilty plea prejudiced government in its ability to respond); Honeycutt v. Ward, 612 F.2d 36 (2d Cir.), cert. denied, 446 U.S. 985 (1980) (prejudicial delay to state under Rule 9(a) required dismissal of a Burgett lack of counsel claim).

The Third Circuit's failure to apply Rule 9(a) instantly virtually eliminates the possibility of finality in state criminal judgments. Prisoners serving long prison terms or life sentences may unilaterally shorten those sentences simply by alleging spurious or fraudulent claims, against which the state is powerless to defend due to the unavailability of records or testimony from officials or witnesses. Indeed, success under the Third Circuit ruling is truly limited only by the imagination of the incarcerated prisoner.

Even where the conviction for which a prisoner is incarcerated is itself not subject to attack by false accusations, the Third Circuit's ruling gives career criminals an incentive to attack their early convictions with fraudulent claims in the hope that their delay will prejudice the state and thus result in resentencing without reference to their prior crimes. The instant case presents such a situation.

Such results invite abuse and manipulation, as occurred instantly where respondent, who alone had the right to appeal the 1974 convictions, preserved the benefits of his lenient sentences by not appealing and then successfully foreclosed the state's use of the prior judgments for recidivist purposes by his delayed attack. Respondent, a repeat sexual offender, can now anticipate being resentenced with the benefits afforded a first time sexual

offender. Such a result serves neither the societal interest nor the rehabilitative need of the recidivist. If permitted to stand, the Third Circuit's decision will thwart implementation of the legitimate recidivist sentencing plans of the states subject to that rule. This Court's review is imperative to prevent that unwarranted intrusion into the state's criminal justice proceedings.

2. **Burgett - Tucker Review**

Similar results follow from the Third Circuit's unwarranted expansion of Burgett and Tucker to respondent's Kent due process claims.[8] Even where there

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[8]The Tucker decision, relied on by the Third Circuit, itself developed from Burgett v. Texas, 389 U.S. 109 (1967). In Burgett, prior convictions which were obtained without the assistance of counsel in violation of Gideon v. Wainwright, 372 U.S. 335 (1963), were used at trial in support of a recidivist charge. Finding a (Footnote Continued)

exists no "self-evident" and "compelling" delay, as in the present case, state interests in the finality of its judgments are gravely undermined by the expansion of Burgett which occurred in this case. Burgett and Tucker do not merely require a remedy when convictions with Gideon violations are used subsequently. Burgett and its progeny actually provide a new avenue for collateral review of the prior convictions to determine whether or not they violate Gideon. The Burgett line of cases thus create an extraordinary avenue

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(Footnote Continued)
Gideon violation to be "inherently prejudicial," the Burgett Court prohibited the use of such convictions either to support guilt or to enhance punishment in a subsequent offense, in order that Gideon not "suffer serious erosion." 389 U.S. at 116. This Court applied Burgett to invalidate a sentence enhanced by prior convictions invalid under Gideon, in United States v. Tucker, and prohibited the impeachment use of convictions with Gideon infirmities in Loper v. Beto, 405 U.S. 473 (1972).

of collateral attack; one which is outside the normal channel of review and which completely evades state procedural and waiver requirements and the policies which they advance. This Court has never extended Burgett's extraordinary remedy to constitutional claims other than Gideon.

The results of Burgett and its progeny were compelled because a Gideon violation "goes to 'the very integrity of the factfinding process' in criminal trials." Loper v. Beto, 405 U.S. at 483-4 (citation omitted). That rationale does not support similar relief for Kent due process claims, however. Such claims do not affect the reliability of the verdict or of the factfinding process, as does a Gideon violation. Indeed, respondent has never alleged any error whatsoever in the factfinding process of either 1974 conviction. The immense impact of Burgett on the finality of state judgments, and the

relatively insignificant interest of a defendant in a delayed challenge to a conviction on grounds other than its inherent unreliability, compel the rejection of the Third Circuit's broad application of Burgett.

The circuits have split over whether Burgett extends to claims other than Gideon. Indeed, the Third Circuit's opinion in the present case created an intra-circuit conflict with the Circuit's en banc decision in United States v. Graves, 554 F.2d 65 (3d Cir. 1977), which found that a Kent due process violation was not of sufficient magnitude to warrant Burgett - Tucker relief. The Fourth Circuit agreed with Graves in Grandison v. Warden, Maryland House of Correction, 580 F.2d 1231 (4th Cir. 1978), and also refused to extend Burgett to juvenile certification claims. In direct conflict are the Tenth and Sixth Circuits which

extended Burgett to claims involving juvenile court proceedings. See Rutledge v. Sunderland, 671 F.2d 377 (10th Cir. 1982); Canary v. Bland, 583 F.2d 887 (6th Cir. 1978).

Direct conflicts exist with respect to other constitutional claims as well. For example, the First and Ninth Circuits prohibited extension of Burgett - Tucker relief to fourth amendment claims, see United States v. Penta, 475 F.2d 92 (1st Cir. 1972); Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976), while the Fifth Circuit permitted it. See Beto v. Stacks, 407 F.2d 313 (5th Cir. 1969). The Seventh Circuit applied Burgett to involuntary guilty plea claims, see United States v. Martinez, 413 F.2d 61 (7th Cir. 1969), while the Sixth Circuit disallowed it. See United States v. Maggard, 573 F.2d 926 (6th Cir. 1978).

These divisions reflect marked disagreement in rationale, with some circuits, such as the Sixth Circuit, finding that the failure to use conventional remedies to attack a conviction renders it presumptively valid absent the sort of obvious defect noted in Burgett. See United States v. Maggard, 573 F.2d 926 (6th Cir. 1978). Also limiting Burgett to Gideon claims are the Third Circuit in Graves, the First Circuit in Penta and the Fourth Circuit in Grandison. In contrast, the Fifth Circuit reads Burgett broadly to prohibit the use of any constitutionally invalid conviction. See Martinez v. Estelle, 612 F.2d 173 (5th Cir. 1980). Accord United States v. Burt, 802 F.2d 330 (9th Cir. 1986). Under the latter rationale, the Ninth Circuit has also extended Burgett relief to ineffective assistance of counsel claims, see United States v. Clawson, 831 F.2d 909 (9th Cir. 1987);

Brown v. United States, 610 F.2d 672 (9th Cir. 1980), and to claims of erroneous comment on a defendant's silence at trial. See United States v. Burt, 802 F.2d 330 (9th Cir. 1986).

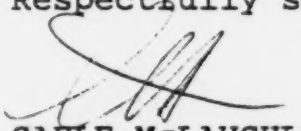
The Third Circuit's published opinion requires this Court's searching examination. Its grant of windfall relief to a state prisoner, because his own dilatoriness successfully foreclosed state response, sets a highly dangerous precedent which will stymy the state's enforcement of its criminal laws. Its unwarranted expansion of Burgett encourages endless relitigation of prior convictions for every imaginable constitutional claim, creating trials within trials and trials within sentencings. There must be a point beyond which the finality of state judgments overrides the interest in mounting attenuated, piecemeal and tangential attacks on those judgments; certainly a

point at which it overrides any interest in challenges based on spurious, fraudulent or unprovable claims. Review by this Court is essential to set those boundaries.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania, through the named petitioners, respectfully requests that a Writ of Certiorari issue to review the decision of the Third Circuit.

Respectfully submitted,



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